I.

Opinions Below.

The first opinion of the District Court refusing petitioners' motion to dismiss the bill is reported in *6 F. Supp. 953.* The second opinion of the district court reversing its first opinion on authority of *Ness* v. *Mutual Life Ins. Co. of N. Y.* 70 F. (2d) 59, and *Mutual Life Ins. Co. of N. Y.* v. *Markowitz,* 78 F. (2d) 396 (certiorari denied 296 U. S. 625), is not yet reported but is found at pages 158-159 of the record. The opinion of the Circuit Court of Appeals reversing this opinion is found at pages 174-179 of the record and is reported in 86 F. (2d) 47.

The relevant portion of the opinion of the Circuit Court of Appeals in the cases of *New York Life Ins. Co.* v. *Gatti* and *New York Life Ins. Co.* v. *Ruhlin,* decided by the Circuit Court of Appeals for the Third Circuit on the same day as the *Stroehmann* case and relied on in the *Stroehmann* case, is not yet reported but is printed in the appendix to the petition for certiorari.

II.

Jurisdiction.

The jurisdiction of this Court is invoked under *Sec. 240 (a) of the Judicial Code,* as amended by the Act of Feb. 13, 1925 (43 Stats. 938; 28 U. S. C. A. Section 347, page 359).

The date of the decree of the Circuit Court of Appeals sought to be reviewed is October 6, 1936 (R. 180).

The petition for writ of certiorari to this Court was docketed to No. 599, October Term, 1936, on December 23, 1936.

On February 1, 1937, this Court granted certiorari, limited to the question of the application and effect of the incontestability clause in Policy No. 4,361,192 (4 U. S. Law Week, page 618).

III.

Statement of the Case.

The case, having been heard on a motion to dismiss (R. 153-157) the amended bill in equity (R. 3-153) filed by Mutual Life Insurance Company of New York, respondent herein, against Carl F. Stroehmann and Lycoming Trust Company, Trustee (R. 152), petitioners herein, in the District Court of the United States for the Middle District of Pennsylvania, all of the facts necessary for consideration of the question to which the certiorari was limited, appear in the amended bill.

For convenience of reference, the Mutual Life Insurance Company of New York will be referred to as "Respondent," Carl F. Stroehmann as "Insured," and Lycoming Trust Company, Trustee (R. 152), as "Beneficiary." To facilitate reference to the opinions of the lower courts, Policy No. 4,361,192, to which the certiorari is limited, will be referred to as "Policy No. 3."

On June 26, 1930, at Norristown, Pennsylvania, insured made written application to respondent for insurance on ordinary life plan with increasing and level disability benefits and with double indemnity benefits. In continuation of and as part of said written application were written declarations made by the insured to respondent's medical examiner.

On June 30, 1930, respondent issued to insured its ordinary life policy No. 4,361,192 (hereinafter referred to as "Policy No. 3") with double indemnity for death by accident and increasing total and permanent disability benefits.

A copy of the application therefor was attached to the policy (Exhibit F, R. 108-118) and by the terms of the policy, was made part thereof (R. 136).

The policy provided for the payment of an annual premium of $1,370.00, of which $40.00 was the premium for the

double indemnity benefit and $288.80 was the premium for the disability benefits (R. 119).

The beneficiary was ultimately changed to Lycoming Trust Company, Trustee (R. 152).

On October 11, 1932, respondent filed its bill in the District Court of the United States for the Middle District of Pennsylvania against insured and the beneficiary, in which it sought, *inter alia,* to cancel the disability benefits contained in Policy No. 3.

The basis on which cancellation was sought was that insured made certain alleged fraudulent misrepresentations with respect to medical attendance and illness in the application for the policy.

Policy No. 3 contained the following provision:

> "INCONTESTABILITY. — Except for non-payment of premiums and except for the restrictions and provisions applying to the double indemnity and disability benefits as provided in sections 1 and 3, respectively, this policy shall be incontestable after one year from its date of issue unless the insured die in such year, in which event it shall be incontestable after two years from its date of issue."

Fraudulent misrepresentations in the application for the policy are not among the restrictions and provisions contained in Sections 1 and 3 of the policy.

The policy having been issued on June 30, 1930, and the insured not having died within a year from its date of issue, the policy became incontestable on June 30, 1931.

Petitioners filed a motion to dismiss the bill because it set forth no cause of action. In support thereof, petitioners urged that as the bill was not filed until October 11, 1932, more than one year and three months after the expiration of the contestable period, and as the bill did not contest the policy on the ground of non-payment of premiums, nor by reason of any restriction or provision contained in Sec. 1 or Sec. 3 of the policy, insurer was precluded from the

contest set forth in the bill of complaint. In other words, the contest sought to be made by the bill of complaint was on the ground of alleged misrepresentations in the application for the policy and such contest was not within the exceptions from the operation of the incontestable clause.

On May 17, 1934, the District Court, in an opinion written by Hon. Albert W. Watson (R. 160-168, reported in 6 F. Supp. 953), denied the motion to dismiss and directed petitioners to answer on the merits.

The District Court held, that, notwithstanding the expiration of the contestable period, respondent was not limited to a contest of liability for disability or double indemnity benefits on the ground of the restrictions and provisions of Sections 1 and 3 of the policy, but could contest such liability on any ground, including fraudulent representations in the application for the policy.

On July 9, 1934, petitioners filed their answer on the merits.

On April 18, 1935, respondent, having been granted leave to amend its bill so as to include additional misrepresentations alleged to have been discovered since the filing of the original bill, filed its amended bill (R. 3-152).

On May 16, 1935, petitioners renewed their motion to dismiss. In support thereof, they urged that, subsequent to the court's previous opinion, the United States Circuit Courts of Appeals for the Fourth and Ninth Circuits in the cases of *Mutual Life Ins. Co. of N. Y.* v. *Markowitz, et al.*, 78 F. (2d) 396, certiorari denied 296 U. S. 625, and *Ness* v. *Mutual Life Ins. Co. of N. Y.*, 70 F. (2d) 59, had held that policies containing incontestable clauses, identical with that in the case at bar, precluded a contest, after the expiration of the contestable period, of the disability benefits on the ground of fraudulent misrepresentations in the application for the policy.

On July 2, 1935, the District Court, on authority of the *Ness* and *Markowitz* cases (*supra*), reversed its former

opinion and dismissed the amended bill without leave to amend (opinion not reported; will be found at R. 158).

On September 6, 1935, respondent appealed, from the order dismissing the bill, to the Circuit Court of Appeals for the Third Circuit.

On September 6, 1936, the Circuit Court reversed the order of the District Court dismissing the bill and remanded the case for further proceedings (R. 174-179; opinion reported 86 F. (2d) 47).

The Circuit Court declined to follow the *Ness* and *Markowitz* cases (*supra*). In its opinion it referred to the case of *Gatti* v. *N. Y. Life Insurance Co.*, decided the same day, and held that the incontestable clause permitted a contest of the disability benefits on any ground and was not limited to the restrictions and provisions of Sections 1 and 3 of the policy. (The opinion in the *Gatti* case is not yet reported, but is printed at pages 30-34 of the petition for certiorari in this case).

On December 23, 1936, your petitioners filed in this Court, their petition for a writ of certiorari and on February 1, 1937, this Court granted the writ, limiting it to the question of the application and the effect of the incontestability clause in Policy No. 4,361,192 (Policy No. 3).

It is this limited question which is now before this Court.

IV.

Question Presented.

Whether an insurer may contest, after the expiration of the contestable period, the validity of the disability provisions of a life insurance policy on the ground of alleged fraudulent misrepresentations in the application for the policy, where the incontestable clause contained in the policy provides,—

> "* * * except for the restrictions and provisions applying to the double indemnity and disability bene-

fits as provided in sections 1 and 3 respectively, this policy shall be incontestable * * * ''

and fraudulent misrepresentations in the application is not one of the restrictions and provisions contained in Sections 1 and 3 of the policy?

V.

Specification of Error.

(As Limited by the Grant of the Writ of Certiorari.)

The Circuit Court of Appeals erred in holding (R. 178-179) that the expiration of the period provided for in the incontestable clause in Policy No. 3 did not preclude the respondent from contesting the validity of the disability benefit provisions contained therein on the ground of fraud in the procurement thereof.

VI.

ARGUMENT.

A.

The provision that an insurance policy shall be incontestable after the expiration of a specified period, means, that, thereafter within the limits of the coverage, the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken.

Modern forms of life insurance policies contain a clause declaring that the policy shall be incontestable after a specified period.

While it is true that in one sense every resistance by the insurer against the demand of a beneficiary or the insured is a contest, the word ''incontestable'' as used in such policies is not used in such sense.

Examination of the authorities reveals that the term ''incontestable'' as used in life insurance policies refers to a

contest directed against the validity of the policy, such as a contest on the ground of fraud in the procurement of the policy. It is not a mandate as to coverage or a definition of the hazards to be borne by insurer.

That such is the proper construction of the term "incontestable," and that such a provision has long been recognized by both the case and statute law of Pennsylvania as a proper provision, is at once apparent from the review of authorities contained in the opinion of the Superior Court of Pennsylvania in the case of *Mayer* v. *Prudential Life Insurance Company of America*, 184 A. 267, 121 Pa. Super. 475.

The question before the Superior Court of Pennsylvania was, whether the incontestable clause contained in a life policy, providing for disability benefits for disability occurring after payment of the first premium, precluded a contest on the ground that insured was disabled prior to the payment of the first premium.

The Superior Court held that the question raised was one relating to whether it was a risk assumed by the policy and not to the validity of the policy and hence, the incontestable clause did not apply. In so holding, the court's opinion so clearly sets forth the principles stated above with respect to incontestable clauses that we will quote at length from the opinion.

The court said (at 121 Pa. Super., at 478, 184 A. at 268):

> "An incontestable clause in a policy of life insurance has long been recognized as being a proper provision and enforceable for the benefit of the insured. Brady *v.* Prudential Life Ins. Co., 168 Pa. 645, 32 A. 102; Central Trust Co. *v.* Fidelity M. L. I. Co., 45 Pa. Super. 313; Lawler *v.* Home Life Ins. Co. of America, 59 Pa. Super. 409; Gorski *v.* Metropolitan Life Ins. Co., 88 Pa. Super. 326; Feierman *v.* Eureka Life Ins. Co., 279 Pa. 507, 124 A. 171, 32 A. L. R. 646. The Act of May 17, 1921, P. L. 682, 40 P. S. Sec. 510, prescribing uni-

form policy provisions, provides: 'No policy of life or endowment insurance * * * shall be issued * * * unless it contains, in substance, the following provisions: * * * (c) A provision that the policy shall be incontestible after it has been in force, during the lifetime of the insured, two years from its date of issue, except for non-payment of premiums, and for engaging in military or naval service in time of war without the consent in writing of an executive officer of the company', which provision was amended by the Act of July 15, 1935, P. L. 1020 (40 P. S. Sec. 510), by adding thereto, 'and that, at the option of the company, provisions relative to benefits in the event of total and permanent disability, and provisions which grant additional insurance specifically against death by accident, may also be excepted.' As the policy was issued and suit was instituted prior to the adoption of the amendment, we need not discuss its meaning on the present appeal. *The real purpose of an incontestable clause is to prevent any defense which may be raised by the insurance company against the validity of the policy, such as fraud, misrepresentation, and condition of health arising in connection with the issuance of the policy;* but as to such provisions and conditions as necessarily must relate to matters which arise after the issuance of a policy and which do not affect the validity of the policy itself, the incontestable clause has not been applied. In Brady *v.* Prudential Ins. Co., *supra*, 168 Pa. 645, at page 650, 32 A. 102, 103, in an opinion by Justice Williams, the court said: 'The provision in the ninth clause (the incontestable clause), which was relied upon to show that the policy was incontestable, did not amount to a confession of judgment. It did not deny to the company the right to defend against an action brought upon the policy, except in so far as the defense might rest on a denial of the validity of the policy itself. All other lines of defense remained open to it.' In Hall *v.* Mutual Reserve Life Ass'n, 19 Pa. Super. 31; Collins *v.* Metropolitan Life Ins. Co., 27 Pa. Super. 353; Sargeant *v.* National Insurance Co., 189 Pa. 341, 41 A. 351; Doll *v.* Prudential

Ins. Co., 21 Pa. Super. 434; McCreighton *v.* American Catholic Union, 71 Pa. Super. 332; Ludwinsha *v.* John Hancock Mutual Life Ins. Co., 317 Pa. 577, 178 A. 28, 98 A. L. R. 705; Robinson *v.* Metropolitan Life Ins. Co., 69 Pa. Super. 274; Starck *v.* Union C. L. Ins. Co., 134 Pa. 45, 19 A. 703, 7 L. R. A. 576, 19 Am. St. Rep. 674, it was held that the incontestable clause does not apply to risks not assumed by the policy. (Italics ours.)

* * * * * * *

"There is a clear distinction between contesting the validity of the policy and denying liability for the reason that disability had not occurred during the period covered by the policy and, therefore, a risk which was never assumed."

* * * * * * *

"This distinction is clearly set forth by Chief Justice Cardozo of the New York Court of Appeals—now Justice of the Supreme Court of the United States—in Metropolitan Life Ins. Co. *v.* Conway, 252 N. Y. 449, 169 N. E. 642:

" 'The provision that a policy shall be incontestable after it has been in force during the lifetime of the insured for a period of two years is not a mandate as to coverage, a definition of the hazards to be borne by the insurer. It means only this, that within the limits of the coverage the policy shall stand, unaffected by any defense that it was invalid in its inception, or thereafter became invalid by reason of a condition broken. Like questions have arisen in other jurisdictions and in other courts of this state. There has been general concurrence with reference to the answer. Sanders *v.* Jefferson Standard L. Ins. Co. (C. C. A.), 10 F. (2d) 143; Flannagan *v.* Provident L. & A. Ins. Co. (C. C. A.), 22 F. (2d) 136; Wright *v.* Philadelphia L. Ins. Co. (D. C)., 25 F. (2d) 514; Scarborough *v.* American Nat. Ins. Co., 171 N. C. 353, 88 S. E. 482, L. R. A. 1918A, 896, Ann. Cas. 1917D, 1181; Myers *v.* Liberty L. Ins. Co., 124 Kan. 191, 257 P. 933, 55 A. L. R. 542; Childress *v.* Fraternal Union of America, 113 Tenn. 252, 82 S. W.

832, 3 Ann. Cas. 236; Brady *v.* Prudential Ins. Co., 168 Pa. 645, 32 A. 102; Illinois Bankers' L. Ass'n *v.* Byassee, 169 Ark. 231, 275 S. W. 519, 41 A. L. R. 379; Woodbery *v.* New York Life Ins. Co., 129 Misc. 365, 221 N. Y. S. 357; *Id.*, 223 App. Div. 272, 227 N. Y. S. 699.

* * *

" 'A provision for incontestability does not have the effect of converting a promise to pay on the happening of a stated contingency into a promise to pay whether such contingency does or does not happen.' (Sanders *v.* Jefferson Standard L. Ins. Co. (C. C. A.), 10 F. (2d) 143, 144 citing and distinguishing Northwestern Life Ins. Co. *v.* Johnson, *supra*, 254 U. S. 96, 41 S. Ct. 47, 65 L. Ed. 155). Where there has been no assumption of the risk, there can be no liability. Hearin *v.* Standard L. Ins. Co. (D. C.) 8 F. (2d) 202; Mack *v.* Connecticut Gen. L. Ins. Co. (C. C. A.) 12 F. (2d) 416; Flannagan *v.* Provident L. & A. Ins. Co. (C. C. A.) 22 F. (2d) 136; Wright *v.* Philadelphia L. Ins. Co. (D. C.) 25 F. (2d) 514; Myers *v.* Liberty L. Ins. Co., *supra;* Draper *v.* Oswego County Fire Relief Ass'n, 190 N. Y. 12, 18, 82 N. E. 755. The kind of insurance one has at the beginning, that, but no more, one retains until the end.' "

From this extract it is clear that both Pennsylvania case and statute law have long recognized and enforced incontestable clauses and that the term "incontestable" as used in life insurance policies refers to a contest directed against the validity of the policy.

B.

The defense of fraudulent representations in the application for a policy is a defense based on the validity of the policy at inception and hence, unless excepted from the operation of the incontestable clause, is precluded thereby.

As we have seen, the incontestable clause in a policy precludes any defense on the policy which is directed to its invalidity at inception. Accordingly, we should expect

that the defense of fraudulent representations in the application, a defense directed to the invalidity of the policy, should be precluded after the expiration of the contestable period. That this is the law will unquestionably appear from the following authorities.

In *Couch Cyclopedia of Insurance Law*, Vol. 8, page 6960, the law is laid down as follows:

> "* * * It also logically follows that inasmuch as incontestable clauses are not against public policy, and are valid and enforceable, every defense within the terms of, or covered by, such clauses, or which is not excepted therefrom, is precluded if not taken advantage of before the clause becomes operative in favor of insured, and this, by the weight of authority, includes the defense of fraud or false statements or warranties in the application for insurance, not for the purpose of condoning the fraud, but as fixing a time beyond which it may not be set up or established; * * *"

In *Cooley's Briefs on Insurance* (Second Edition), Vol. 5, page 4501, it is said:

> "It is obvious that, as a general rule, a policy containing a clause declaring that it shall be incontestable after a specified time cannot be contested after that time on any ground not excepted therein."
>
> * * * * * * *
>
> "When the incontestable clause first appeared in policies, it was strenuously contended that the clause did not prevent the insurer from relying on fraud in the procurement of a policy as a defense to an action thereon. But in the leading case of Wright *v.* Benefit Life Ass'n, 118 N. Y. 237, 23 N. E. 186, 16 Am. St. Rep. 749, 6 L.R.A. 731 (affirming 43 Hun, 61), the New York Court of Appeals squarely held that a provision making a policy incontestable after a certain time from its date embraced the defense of fraud of the insured and the beneficiary in obtaining the insurance. The court points out that the stipulation is not a stipula-

> tion absolute to waive all defenses and to condone fraud. On the contrary, it recognizes fraud and other defenses, and merely limits the time within which they may be, but after which they cannot be, established. The stipulation, the court says, is in the nature of, and serves a similar purpose as, statutes of limitations and repose, the wisdom of which is apparent to all reasonable minds. As the stipulation no doubt is a strong inducement to a person to take out insurance, the court says: 'While fraud is obnoxious and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specific time, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid.' ''

At page 4503, of the same text, the following rule is laid down (citing numerous authorities):

> "The rule that a stipulation making the policy incontestable after a specified period from its date includes fraud in the procurement of the policy, provided the time given is reasonable, is well settled."

That the Pennsylvania courts have uniformly held that the defense of fraudulent representations in the application for a policy is precluded at the expiration of the contestable period clearly appears from the following authorities.

Mayer v. *Prudential Life Ins. Co.*, 121 Pa. Super. 475, 184 A. 267;

Lawler v. *Home Life Ins. Co.*, 59 Pa. Super. 409;

Brady v. *Prudential Ins. Co.*, 168 Pa. 645, 32 A. 102;

Feierman v. *Eureka Life Ins. Co.*, 279 Pa. 507, 124 A. 171;

Cohen v. *Metropolitan Life Ins. Co.*, 112 Pa. Super. 314, 171 A. 106;

Gorski v. *Metropolitan Life Ins. Co.*, 88 Pa. Super. 326.

In *Mayer* v. *Prudential Life Ins. Co.*, from which we have quoted at length (pages 8-10 of this brief), the Pennsylvania Superior Court said (at 184 A. 269, 121 Pa. Super. at 479):

> "The real purpose of an incontestable clause is to prevent any defense which may be raised by the insurance company against the validity of the policy, such as fraud, misrepresentation, and condition of health arising in connection with the issuance of the policy; * * *"

In *Lawler* v. *Home Life Ins. Co.*, 59 Pa. Super. 409, the court, speaking through Henderson, J., said (at p. 412):

> "Whatever its effect might be if it related to the date of the execution of the policy the evident intention in fixing a time at a considerable period after the policy went into operation was to give the insurer an opportunity to investigate the honesty of the insured in making his application and his truthfulness and good faith with reference to the statements therein contained. The insurer thus saved to itself an opportunity to inquire whether the contract should be continued or whether by reason of the untruthful representations of the insured, it should be cancelled. The agreement that the contract should be unimpeached after the lapse of a year may be assumed to have been an inducement to the taking out of the policy. To the insured the meaning of the language of the clause would be that if the company failed to discover any fraudulent conduct on the part of the insured within the time limited it would bind itself to make no defense on that account after the period reserved for such investigation. This gave the insured and the beneficiary protection against possible litigation after a long period had elapsed and when evidence on the disputed questions might not be within reach of the person for whose benefit the policy was issued. The provision is not a contract to condone fraud nor against public policy as tending to encourage dishonesty. It has the

effect rather of a statute of limitations affecting the right of the company to introduce a defense. Abundant time is allowed the insurer to make inquiry and discover any misrepresentation bearing on the liability of the company and if within the period named an inquiry is not made or material facts are not developed it is reasonable that the insurer be held to the terms of the contract. The condition was not absolute from the beginning to waive all defenses but an agreement not to defend after a reasonable period fixed in the contract. Such a condition in a policy was held good in Wright *v.* Mut. Ben. Life Assn. of America, 118 N. Y. 237, and in Regan *v.* Union Mut. L. Ins. Co,. 189 Mass. 555. To the same effect is Brady *v.* Prudential Ins. Co., 168 Pa. 645, * * *."

That the Federal courts have followed the same rule clearly appears from the following authorities:

Great Western Life Ins. Co. v. *Snavely,* 206 Fed. (C. C. A. 9th Cir.) 20; 46 L. R. A. (N. S.) 1056;

Arnold v. *Equitable Life Assur. Soc.,* 228 Fed. 157. (Dist. Court S. D. Iowa);

Dakota Life Ins. Co. v. *Midland Nat. Bank,* 18 F. (2d) 903. (C. C. A., 8th Cir.);

Northwestern Mutual Life Ins. Co. v. *Pickering,* 293 Fed. (C. C. A. 6th Cir.) 496;

Hurt v. *New York Life Ins. Co.,* 51 F. (2d) (C. C. A., 10th Cir.) 936; affirmed on rehearing, 53 F. (2d) 450, certiorari denied, 285 U. S. 541.

From these authorities, it is now well settled that unless fraudulent statements in the application for the policy are excepted from the operation of the incontestable clause, a defense based thereon is precluded.

We come, then, to the question of whether the incontestable clause of Policy No. 3 excepted fraudulent statements in the application.

C.

The incontestable clause contained in Policy No. 3 (Policy No. 4,361,192) did not except fraudulent statements in the application for the policy.

The incontestable clause in Policy No. 4,361,192 (referred to herein as Policy No. 3) to which this certiorari is limited, provides (R. 135):

> "Incontestability.—Except for non-payment of premiums and *except for the restrictions and provisions applying to the Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively,* this Policy shall be incontestable after one year from its date of issue unless the Insured dies in such year, in which event it shall be incontestable after two years from its date of issue." (Italics ours.)

Petitioners contend that the contestable period having expired and the insurer not seeking to contest the policy on the ground of non-payment of premiums or by reason of any restriction or provision contained in Section 1 or 3 of the policy, but on the ground of fraudulent statements in the application, such contest is precluded. In other words, petitioners contend that since neither Section 1 or 3 contains any restriction or provision respecting fraudulent statements in the application for the policy, the insurer has not excepted out of the operation of the incontestable clause a contest on the ground of alleged fraudulent statements and hence, is precluded from contesting the policy on such ground.

Supporting petitioners' contention are the following authorities:

Ness v. *Mutual Life Ins. Co. of N. Y.*, 70 F. (2d) 59, (C. C. A. 4);

Mutual Life Ins Co. of N. Y. v. *Markowitz et al.*, 78 F. (2d) 396 (C. C. A. 9), certiorari denied 296 U. S. 625;

New York Life Ins. Co. v. *Truesdale,* 79 F. (2d) 481 (C. C. A. 4);

New York Life Ins. Co. v. *Kauffman,* 78 F. (2d) 398 (C. C. A. 9, certiorari denied 296 U. S. 626;

Horwitz v. *et ux.* v. *New York Life Ins. Co.,* 80 F. (2d) 295 (C. C. A. 9);

New York Life Ins. Co. v. *Yerys,* 80 F. (2d) 264 (C. C. A. 4);

Thompson v. *N. Y. Life Ins. Co.,* 9 F. Supp. 248 (Dist. Court of Okla.); affirmed on another ground 78 F. (2d) 946 (C. C. A. 10);

Kiriakides v. *Equitable Life Assur. Soc. of U. S.,* 177 S. E. 40 (Supreme Court of South Carolina);

Mutual Life Ins. Co. of N. Y. v. *Gargolis,* 53 P. (2d) 1017, decided by Dist. Court of Appeals, 3rd Dist. of California on Jan. 22, 1936;

Wilson v. *Equitable Life Ins. Co.,* 262 N. W. 525 (Supreme Court of Iowa);

New York Life Ins. Co. v. *Thomas et ux.,* 27 Dist. & County Reports (Penna.) 215—decision of Court of Common Pleas of Luzerne County, Penna.;

Stroehmann v. *Mutual Life Ins. Co. of N. Y.*—opinion of Dist. Court in the case at bar reversing, on authority of the *Ness* and *Markowitz* cases (*supra*), its former opinion (opinion not yet reported officially—R. 158-159).

The *Ness, Markowitz* and *Gargolis* cases (*supra*), were all cases involving policies issued by the respondent and containing incontestable clauses identical with that in the case at bar.

The contention of respondent, adopted by the District Court in its first opinion (R. 160-168, 6 F. Supp. 953) and the Circuit Court of Appeals (R. 174-179, 86 F. (2d) 47), is that, notwithstanding the expiration of the contestable

period, insurer is not limited to a contest of liability for disability or double indemnity benefits on the ground of the restrictions and provisions of Sections 1 and 3 of the policy but may contest such liability on any ground, including fraudulent representations in the application for the policy.

In support of this contention, respondent relied, in the court below, on the following cases, all of which were decided prior to the *Ness* and *Markowitz* cases and all of which, with the exception of the *McConnell* case, involved an incontestable clause differing from the phraseology of that involved in the case at bar:

Kaffanges v. *New York Life Ins. Co.*, 59 F. (2d) 475 (C. C. A. 1st);

New York Life Insurance Co. v. *Bullock*, 59 F. (2d) 747 (D. C. S. D. Fla.);

New York Life Insurance Co. v. *Davis*, 5 Fed. Supp. 316, 319, D. C. W. D. Pa. Nov. 25, 1933;

New York Life Insurance Co. v. *Ruhlin*, D. C. W. D. Pa. April 13, 1935, not yet reported;

Mutual Life Ins. Co. of N. Y. v. *Stroehmann* (first decision) 6 Fed. Supp. 953, D. C. M. D. Pa. May 17, 1934;

Penn Mutual Life Ins. Co. v. *Joseph*, 5 Fed. Supp. 1003, D. C. Minn. 4th Div. Feb. 12, 1934;

Connecticut General Life Ins. Co., v. *Brandstein*, 233 N. Y. App. Div. 723;

Roth v. *Mutual Life Ins. Co. of N. Y.*, 239 N. Y. App. Div. 798;

Steinberg v. *N. Y. Life Ins. Co.*, 263 N. Y. 45, 47, 188 N. E. 152;

Chambers v. *New York Life Ins. Co.*, 148 N. Y. Misc. 561, affd. 240 N. Y. App. Div. 1027, without opinion;

Guardian Life Ins. Co. v. *Katz*, 243 N. Y. App. Div. 11, 275 N. Y. Supp. 743;

Connecticut Mutual Life Ins. Co. v. *Hirsch*, 266 N. Y. Supp. 950;

Mutual Life Ins. Co. of N. Y. v. *Union Trust Co.*, 244 N. Y. App. Div. 764;

Penn Mutual Life Ins. Co. v. *Hartle*, 166 Atl. 614 (Md.);

Mutual Life Insurance Co. of N. Y. v. *McConnell*, 20 Pa. Dist. & Co., 250 (Common Pleas Mercer Co.);

Greber v. *Equitable Life Assur. Soc.*, 28 Pac. (2d) 817 (Ariz.);

Scott v. *New England Mutual Life*, 253 N. W. 685, (Neb.); on rehearing 256 N. W. 910, which report states in substance the incontestable clause;

New York Life Ins. Co. v. *Gresham*, 154 So. 547 (Miss.);

Paulson v. *Montana Life Ins. Co.*, 43 Pac. (2d) 971 (Wash.).

The following cases have been decided since the *Ness* and *Markowitz* cases and each of these cases recognizes that the incontestable clause in those cases (and the case at bar) is more limited, and, that the limitation is a distinguishing factor.

Pyramid Life Ins. Co. v. *Selkirk*, 80 F. (2d) 553 (C. C. A. 5);

Smith v. *Equitable Life Assur. Soc.*, 89 S. W. (2d) 165 (Supreme Court of Tennessee).

Before considering the authorities referred to, let us first consider the question presented from the standpoint of the applicable principles involved.

Let us start with those general principles to which, it was apparent from the argument in the court below, petitioners and respondent agree. These principles, the authorities for which we have set forth (pages 7-15 of this brief), are:

1. The incontestable clause in an insurance policy, when properly applied, has no application to defenses going to the coverage of, or risk assumed by, the policy,

but applies solely to defenses going to the validity of the policy.

2. The defense of fraudulent statements in an application for a policy is a defense going to the validity of the policy and hence, subject to the operation of the incontestable clause.

It was further apparent from the argument in the court below that petitioners and respondent agree that,—

1. Where a life insurance policy provides for life, double indemnity and disability benefits, the incontestable clause, contained therein, precludes any contest going to the validity of such policy, whether claim is made under the life, double indemnity or disability features, unless proper exception from the operation of the incontestable clause is made.

2. That, by appropriate language, there may be excepted, from the operation of the incontestable clause, defenses going to the validity of the policy when claims are made under the double indemnity or disability benefits contained in a life policy.

Where, then, does the dispute arise? The dispute is whether respondent, applying the principles set forth above, did use appropriate language in the incontestable clause of its life policy, with disability and double indemnity benefits, which it issued to insured, to except therefrom all claims arising under the disability or double indemnity features. As we have seen, the language used by respondent, which it insists has such effect, is:

"Incontestability.—Except for non-payment of premiums and *except for the restrictions and provisions applying to Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively,* this policy shall be incontestable." (Italics ours.)

It is petitioners' contention that such language,—

(a) clearly limits the exception from the incontestable clause to the particular "restrictions and provisions *applying to* Double Indemnity and Disability Benefits as provided in Sections 1 and 3," and that fraudulent statements in the application for the policy, not being among the provisions and restrictions contained in Sections 1 or 3, were not excepted from the operation of the incontestable clause; hence, a defense on such ground is precluded after the expiration of the contestable period.

(b) at most, creates an ambiguity, which, under familiar rules of construction, must be construed most strongly against the insurer, whose language it is.

Respondent contends that such language,—

(a) does not limit the exception to the particular provisions and restrictions of Sections 1 and 3 but excepts *the obligation to pay* disability and double indemnity benefits and permits the making of any defense to a claim for such benefits, including the defense of fraudulent statements in the application;

(b) even if ambiguous, it was placed in the policy pursuant to a provision of the Insurance Statute in the State of New York and the legislative history of such provision should be considered in its interpretation.

Before turning to the particular provisions and restrictions in Sections 1 and 3 of the policy, we want to point out what we think are two very significant things:

1. The first significant thing is that the obligation to pay the Disability and Double Indemnity Benefits is found on page 1 of the policy and not in Sections 1 and 3 of the policy. Sections 1 and 3 of the policy limit the obligation to pay the Disability and Double Indemnity Benefits provided for

on page 1 of the policy. *If, as respondent contends, it intended to except from the operation of the incontestable clause the liability to pay Disability and Double Indemnity Benefits, they could very readily have said, "Except for the Disability and Double Indemnity Benefits as provided on page 1 of this policy."* This is at once apparent from an examination of page 1 of the policy (R. 119), the essential portions of which are as follows:

The policy provides on page 1 (R. 119):

THE
MUTUAL LIFE
INSURANCE COMPANY
OF NEW YORK

WILL PAY

to * * * * Beneficiary

Death Benefit — FORTY THOUSAND Dollars

upon receipt of due proof of the death of CARL F. STROEHMANN, the Insured,

OR

Double Indemnity — EIGHTY THOUSAND Dollars

upon receipt of due proof that such death resulted from bodily injury effected solely through external, violent, and accidental means, and occurred within ninety days after such injury, all upon the conditions set forth in Section I,

AND

if the Insured is totally and presumably permanently disabled before age 60,

WILL PAY

Disability Benefits (a) Income and (b) Waiver of Premium Indemnity — to the Insured FOUR HUNDRED Dollars monthly during such disability, increasing after five and ten years continuous disability, besides waiving premium payments, all upon the conditions set forth in Section 3.

As the policy is printed in the Record at page 119, it does not show in the margin the marginal notations which we have indicated above and which are found in the original policy. If this Court deems this divergence, from the original record, of sufficient importance to require that the original record be produced in Court, petitioners will ask for authority to have the original record sent up.

From the above, we submit that it is apparent that the obligation to pay the Disability and Double Indemnity Benefits is set forth on page 1 of the policy and not under Sections 1 and 3 of the policy. As we will see from an examination of these sections, they limit the obligation to pay these benefits as set forth on page 1 of the policy.

2. The second significant thing is that the language used by the respondent, to create an exception from the incontestable clause, refers to "the provisions and restrictions *applying to* the Disability and Double Indemnity Benefits as provided in Sections 1 and 3." We submit that the word "provisions" is used here in the sense of the provisions which *apply to* and not provisions which *create* the Disability and Double Indemnity Benefits.

This distinction is all the more apparent when we examine the policy and find that the restrictions and provisions which are set forth in Sections 1 and 3 are the provisions and restrictions which *apply to* the Double Indemnity and Disability Benefits, but which do not apply to the life benefits. Let us turn, then, to Sections 1 and 3 of the policy and see what these provisions and restrictions are. In this connection, we will set forth only those provisions and restrictions of Sections 1 and 3 of the policy to which the incontestable clause has been held to apply.

Section 1 of the policy reads (R. 121):

> "The Double Indemnity will be payable upon receipt of due proof that * * *; *provided* that the Double

Indemnity shall not be payable if death resulted from self-destruction, whether sane or insane, or from military or naval service in time of war, or from any act incident to war, or from engaging in riot or insurrection, or from committing an assault or felony, or from participation in aeronautics, or directly or indirectly from disease or bodily or mental infirmity." (Italics ours.)

Section 3 of the policy reads (R. 124):

"SECTION 3. Benefits in Event of Total and Permanent Disability before Age 60.

. . . . . .

"General *Provisions*

. . . . . .

"Disability Benefits shall not be granted if disability is the result of self-inflicted injury.

"The provision for Disability Benefits shall automatically terminate if the Insured shall at any time, voluntarily or involuntarily, engage in military or naval service in time of war outside of the continental limits of the United States of America and the Dominion of Canada." (Italics ours.)

We submit that the use of the word "*provided*" in Section 1 and the use of "*General Provisions*" in Section 3 supports our contention. The "provisions" referred to in the exception contained in the incontestable clause are those which under the double indemnity clause in Section 1 follow the word "provided," to-wit: double indemnity shall not be payable if death results from

(a) self-destruction whether sane or insane,
(b) military or naval service in time of war,
(c) any act incident to war,
(d) engaging in riot or insurrection,
(e) committing an assault or felony,
(f) participation in aeronautics.

The "provisions" referred to in the exception contained in the incontestable clause are likewise those contained in Section 3, which are found under the title *"General Provisions"* and among these are the following:

(a) that disability benefits shall not be granted if the disability is the result of self-inflicted injury.

(b) that disability benefits shall terminate if insured shall voluntarily or involuntarily engage in military or naval service.

Examination of the policy shows that none of the provisions set forth in either Section 1 or 3 *apply* to the life benefits. The policy contains no provisions or restrictions applying to the life benefits respecting military or naval service, engaging in riot or insurrection, committing an assault or felony or participating in aeronautics. This, we submit, is eloquent evidence of the fact that when respondent excepted "the provisions and restrictions *applying* to Double Indemnity and Disability Benefits as provided in Sections 1 and 3," it intended to except the particular provisions and restrictions of Sections 1 and 3 and did not intend to except the obligation to pay the benefits which is set forth on page 1 of the policy.

In this connection, it should be noted that both Sections 1 and 3 provide that the double indemnity and disability benefits *shall not be paid* if death results from self-destruction while sane or insane.

Section 14 of the policy reads (R. 134):

"Section 14. Miscellaneous Provisions.

* * * * * * *

"Suicide.—In the event of the self-destruction of the Insured, whether sane or insane, within one year after the date of issue of this Policy, the amount payable shall be limited to an amount equal to the premiums paid hereon."

Thus, with respect to double indemnity and disability benefits, self-destruction while sane or insane, no matter how long after the inception of the policy, will not create an obligation on the respondent. On the contrary, with respect to life benefits, no restriction is placed on self-destruction, whether sane or insane, if such self-destruction occurs more than a year after the issuance of the policy.

We submit, that, when the respondent excepted, from the incontestable clause, "the restrictions and provisions *applying to* double indemnity and disability benefits as provided in Section 1 and 3," it wanted to preserve its right to contest the policy on the ground that the claim resulted from (a) an act of self-destruction while sane or insane, (b) engaging in military or naval service, (c) commission of an illegal act or (d) participation in aeronautics. All of these defenses are defenses which arise out of "the restrictions and provisions *applying to* double indemnity and disability benefits" and are "provided in Sections 1 and 3."

But, says respondent, this construction makes the language of the exception a nullity for all of these provisions are matters of coverage or risk and not subject to the operation of the incontestable clause which operates only upon defenses going to the validity of the policy.

As we have pointed out, we agree that such is the effect of the incontestable clause when *properly* applied. The difficulty is that all courts have not recognized this distinction and all courts have not agreed on what is a matter of coverage or risk and what is a matter of validity. The matters on which they have differed are these very provisions, to-wit: suicide while sane or insane; death while in (a) military or naval service, (b) committing an illegal act, (c) participating in aeronautics, and self-infliction of disability.

That there is a conflict of the authorities on the effect of the incontestable clause on—

(a) suicide clauses—see annotations in 55 A. L. R. 549, 67 A. L. R. 1364;

(b) conditions against liability for injury while engaged in aeronautics, see annotations in 83 A. L. R. 394;

(c) an express exception in the incontestable clause as negativing other exceptions thereto, see annotation in 88 A. L. R. 773;

(d) excluding defenses based on public policy, see annotations in 6 A. L. R. 448; 13 A. L. R. 674; 35 A. L. R. 1491.

In *Vance on Insurance* (2nd Edition), Hornbook Series, page 821, Professor William R. Vance, of Yale University Law School, very clearly points out that there does exist, in the cases, considerable conflict with respect to the operation of the incontestable clause. At page 821, Professor Vance says (citing many authorities for the propositions set forth):

> "If the defense which the insurer seeks to set up is reserved to the insurer by the terms of the incontestable clause itself, obviously the clause will not bar the insurer's right to avail himself of this defense. In many cases the clause itself provides that it shall not be applicable to such defenses as fraud, or suicide. But difficulty comes with those cases where an attempt is made in the policy to exclude the risk, but not in the incontestable clause. The question whether the incontestable clause overrides the attempted exclusion in the policy has been made to depend on whether the exclusion was by a technical exception, or merely by a condition, the breach of which would enable the insurer to terminate his liability. The incontestable clause should be construed merely as an agreement on the part of the insurer not to contest the validity of the policy as written. On principle, it should not operate to prevent the defense of an action, even after the expiration of the contestable period, on the ground that the loss was not covered because excepted under the

terms of the policy. This distinction between risks expressly excepted from the coverage of the policy, and mere conditions in the policy giving to the insurer the power of terminating his liability thereon, has been recognized in several jurisdictions. Thus where the policy expressly excepted the risk of death by suicide within one year, the insurer need not make a contest within the designated contest period in order to defend on the ground that the insured took his own life within the year. However, many courts have failed to distinguish between such excepted risks, and mere conditions in the policy, holding that in either event such defense is barred to the insurer unless asserted within the contest period. Thus even though the policy provided that 'self-destruction, sane or insane, within one year from the date of this policy is a risk not assumed by the company under this policy,' it has been held that the privilege of defending after the time limit for contest, on the ground that the insured committed suicide within the year, was barred.

"It seems to be uniformly held that where the defense sought to be raised is a mere condition, not contained in the incontestable clause, it will be barred if not asserted within the contestable period. Thus where the policy provides that it will be avoided if the insured commits suicide within a year, the insurer must institute his contest within the time fixed by the incontestable clause. Likewise the incontestable clause has been held to preclude the insurer from showing in defense that the insured came to his death in consequence of a violation of the law, contrary to a policy condition; or by execution for crime."

Accordingly, it is apparent, that, while on principle, the incontestable clause should not operate to preclude a contest on the ground that the loss which occurred was not covered because it was excepted under the terms of the policy, nevertheless there is quite a conflict among the decisions as to whether or not a risk is an excepted risk or a

condition and whether it is subject to the operation of the incontestable clause.

Since this conflict of decisions exists, we need not assume that it was an excess of caution which moved the respondent to except suicide, military or naval service, participation in aeronautics, and other provisions of Sections 1 and 3 of the policy, from the incontestable clause. Protection against this conflict is, we submit, a reasonable interpretation of the clause and one in accord with the plain meaning of the language employed.

Not only is it a reasonable inference that respondent wanted to protect itself against this conflict of decisions, on the question of whether the incontestable clause applied to exceptions from the risk, but it is also a reasonable inference that respondent wanted to protect itself against the application of the incontestable clause, should the provisions of Sections 1 and 3 be construed to create conditions subsequent.

While the incontestable clause does not properly apply to matters of coverage, it does apply to conditions subsequent which relate to the validity of the policy.

It may be that, in the light of the fact that Sections 1 and 3 of the policy provide that no benefits shall be paid in the event of self-destruction, engaging in war, etc., and do not provide that the premiums paid shall be returned in such event, the provisions of Sections 1 and 3 would be construed to create a condition subsequent which is subject to the incontestable clause.

That, it has been held, that a provision in a policy forfeiting the premiums paid, is subject to the incontestable clause, see *Northwestern Mutual Life Ins. Co.* v. *Johnson*, 254 U. S. 96.

In his opinion in the case of *Metropolitan Life Insurance Company* v. *Conway, Supt. of Ins.*, 252 N. Y. 449, 169 N. E. 642, Mr. Justice Cardozo—then Chief Justice of the Court

of Appeals of New York—points out that the *Johnson* case is not in conflict with the rule that the incontestable clause does not apply to matters of coverage. He says (252 N. Y. 449, at 453):

> "Northwestern Mutual Life Ins. Co. *v.* Johnson (254 U. S. 96 (1920)) is not a decision to the contrary. The clause there in question was not a limitation as to coverage. It was a provision for a forfeiture. In case of the suicide of the insured, whether sane or insane, the policy was to be 'void.' This meant the forfeiture of the privilege to receive the surrender value of the policy or equivalent benefits, a privilege which would survive if there was merely a limitation of the hazards. Statutes there are indeed whereby the enjoyment of surrender values is preserved against forfeiture by the insurer for breach of a condition as to the payment of premiums (see *e. g.*, N. Y. Ins. Law, Secs. 88, 101, subd. 6), but not against conditions generally. What was said by Holmes, J., of the effect of the 'incontestable clause' must be read in the light of the question before him. It is true, as he says, that with such a clause the death of the insured coupled with the payment of the premiums, will sustain a recovery in the face of a forfeiting condition. It is quite another thing to say that the same facts will prevail against a refusal to assume the risk. Later cases in the Federal courts develop the distinction clearly."

We submit, therefore, that it is a reasonable inference, that respondent desired to protect itself against the possibility of any court holding that the provisions of Sections 1 and 3 of the policy created conditions subsequent and hence, unless specifically excepted from the incontestable clause, subject to its operation.

That there is a conflict in the decisions even as to what is a condition subsequent which is subject to the incontestable clause and what is an excepted risk, is well illustrated by a recent decision.

Thus, in the case of *Bernier v. Pacific Mutual Life Ins. Co.* 173 La. 1078, 139 So. 629, 88 A. L. R. 765, the policy provided that in the event insured's death resulted from aerial navigation (with certain exceptions as to licensed pilots, etc.), "the only liability under this policy shall be for a sum equal to the premiums paid." The policy, likewise, provided that if insured should engage in military or naval service within a specified time, liability under the policy would be limited to dividend additions, etc. The incontestable clause contained therein provided that the policy should be incontestable except for non-payment of premiums or violation of the condition of policy relating to military or naval service. The Louisiana Supreme Court (three judges dissenting) held the *Conway* case did not apply and the provision against aerial navigation was subject to the incontestable clause. The court put its decision largely on the ground that if the aerial navigation clause was one limiting the coverage, so was the one relating to war or naval service, and since the insurer had seen fit to specifically except from the incontestable clause only the war and naval service clause, they must have intended to have it apply to the aerial navigation clause.

We submit the point is, not whether all these conflicting decisions can be reconciled or distinguished, but that they do exist and it is reasonable to suppose that respondent wanted to avoid such conflicting decisions and except out of the operation of the incontestable clause all these provisions relative to naval or war service, suicide, etc., about which the authorities are so conflicting.

In *Ness* v. *Mutual Life Insurance Company of New York*, 70 F. (2d) 59 (C. C. A. 4), the Circuit Court of Appeals for the Fourth Circuit had before it a policy issued by respondent with an identical incontestable clause. In holding that it was limited to the provisions and restrictions con-

tained in Sections 1 and 3 of the policy, the Court said (at page 60):

> "The purpose of the second exception in the incontestability clause was to make clear that, notwithstanding the provisions of that clause, the company reserved the right to rely upon the restrictions and provisions contained in sections 1 and 3. Thus the right was reserved to contest, under section 1, liability for double indemnity in case of suicide or death resulting from military or naval service or from engaging in felony. And the right was reserved to contest, under section 3, claims for disability where due proofs had not been furnished, or where upon request of the company proofs of the continuance of the disability had been refused, or where the disability resulted from self-inflicted injury or from military or naval service beyond the continental limits of the United States and Canada. Under some recent decisions defenses under clauses such as those contained in sections 1 and 3 are held not to be precluded by the incontestability clause. See Scales *v.* Jefferson Standard Life Ins. Co., 155 Tenn. 412, 295 S. W. 58, 55 A. L. R. 537, and note, and Wright *v.* Philadelphia Life Ins. Co. (D. C.) 25 F. (2d) 514, and cases there cited. But in many jurisdictions it is held that the incontestability clause does preclude a defense based upon such provisions. See notes in 55 A. L. R. 549 and 67 A. L. R. 1364. It was evidently to guard against a construction of the policy holding that the defenses reserved in sections 1 and 3 were precluded by the incontestability clause, that the second exception in that clause was inserted."

We have cited (pages 16-17) the opinions of other courts which agree with this analysis.

Since the Ness decision no court, except the court below, has refused to follow it when the exact language of the *Ness* case was involved.

Thus, in *Mutual Life Ins. Co. of N. Y.* v. *Markowitz,* 78 F. (2d) 396 (certiorari denied 296 U. S. 625), and *Mutual*

Life Insurance Company of New York v. *Gargolis*, 53 P. (2d) 1017 (Dist. Court of Appeals of California), the only cases in which an incontestable clause identical to that of the *Ness* case was involved, the *Ness* case was followed.

In the other cases (cited pages 16-17) the principles of the *Ness* case were approved and applied to incontestable clauses which, we submit, were not as restricted as that in the *Ness* case.

The court below relied (R. 179, 86 F. (2d) 49) on its opinion in the case of *New York Life Ins. Co.* v. *Gatti* and *New York Life Ins. Co.* v. *Ruhlin* (decided by it on same day—not yet reported because petition for rehearing is pending, but printed as appendix to petition for certiorari in case at bar).

Examination of the *Ruhlin* and *Gatti* cases showed that the court below relied on *Pyramid Life Ins. Co.* v. *Selkirk*, 80 F. (2d) 553 (C. C. A. 5). In neither the *Ruhlin* and *Gatti* cases, nor in the *Selkirk* case, was the language of the incontestable clause in the case at bar involved. And we submit that it is significant that even in the *Selkirk* case the court conceded that the language of the incontestable clause was more restricted in the *Ness* case. The court said, 80 F. (2d) 553, at 554:

> "Ness *v.* Mutual Life Ins. Co. (C. C. A.) 70 F. (2d) 59, 61, strongly relied upon by appellee, is inapposite to the determinative question here presented. The incontestability clause there considered, unlike this clause, provides that: '* * * Except for the restrictions and provisions applying to the double indemnity and disability benefits *as provided in Secs. 1 and 3*, respectively, this policy shall be incontestable after one year * * *.' (Italics supplied). Thus, as emphasized in the Ness Case, that exception was expressly limited to the restrictions and provisions 'enumerated in the sections to which specific reference was made, i. e. sections 1 and 3,' of that policy, which in general

> correspond to the rider here under consideration. It is as if the clause here under consideration had been written, '* * * Except as to provisions and conditions relating to disability benefits as provided in the rider attached to this policy, * * *' which is the construction contended for by appellee, in which he prevailed below. But no such restrictive language here appears. Its absence clearly distinguishes this case from the Ness Case, as the exception considered in the latter is much more limited than that here involved."

We submit that irrespective of the construction of the incontestable clause in the *Ruhlin* and *Gatti* cases, there is a distinction from those cases arising out of the language of the incontestable clause in the *Ness* case and it should have been recognized by the court below.

If, as respondent contends, it intended to except from the operation of the incontestable clause all claims under the disability and double indemnity benefits, there are any number of ways in which this could have been clearly expressed.

We have seen that the obligation to pay the double indemnity and disability benefits is found on page 1 of the policy. Respondent could have said:

> "Except for the Double Indemnity and Disability Benefits as provided on page 1 of the policy."

Or respondent could have said:

> "Except for non-payment of premiums and except as to all claims for double indemnity and disability benefits, this policy shall be incontestable after one year from its date of issue. * * *"

Or if it intended to have its incontestable clause apply to double indemnity and disability benefits, but to reserve the right to contest such claims on the ground of fraud, it would have written a clause substantially as follows:

> "Except for non-payment of premiums and except as to fraud in procuring double indemnity and insurance against disability, this policy shall be incontestable after one year from its date of issue. * * *"

But it did neither. It did not exclude all claims for double indemnity and disability, and it did not except fraud as a defense. It declared that—

> "Except for non-payment of premiums and *except for the restrictions and provisions applying to Double Indemnity and Disability Benefits as provided in Sections 1 and 3 respectively,* this policy shall be incontestable after one year from its date of issue. * * *"

What is excepted by this clause is not the obligation to pay double indemnity or disability benefits, but only those restrictions and provisions relating thereto which appear in Sections 1 and 3.

These restrictions and provisions, as we have seen, are those relating to suicide, war or naval service, self-inflicted injury, etc., with respect to which the courts are in conflict as to whether they are subject to the incontestable clause and against which conflict insurer was seeking to, or could reasonably be construed to be seeking, to protect itself.

Since this conflict of decisions exists, we need not assume that it was an excess of caution which moved the respondent to except suicide, military or naval service, participation in aeronautics, and other provisions of Sections 1 and 3 from the incontestable clause. Protection against this conflict is we submit a reasonable interpretation of the clause and one in accord with the plain meaning of the language employed.

We submit that the language used by the respondent clearly means that the exception is limited to the particular restrictions and provisions contained in Sections 1 and 3 of the policy and the exception did not cover fraudulent state-

ments in the application for the policy.

Even if the language is regarded as ambiguous, neither a provision of the insurance law of the State of New York, nor the reason for its enactment, should be considered in its interpretation.

D.

Neither a provision of the insurance law of the State of New York, nor the reason for the enactment of the same, is applicable to the interpretation of the incontestable clause contained in Policy No. 3 (Policy No. 4,361,192).

Respondent strenuously urged in the court below that the exception from the incontestability clause was inserted pursuant to express authority of an amendment of Section 101, subdivision 2 of the New York Insurance Law, and that such amendment was made to remove an advantage which accident and health companies had in New York State prior to the enactment of such section and that this should be considered by the court in the interpretation of the incontestable clause.

Prior to 1923, Section 101, subdivision 2 of the New York Insurance Law provided:

> "Sec. 101. S t a n d a r d Provisions. * * * no policy of life or endowment insurance shall be issued or delivered in this state * * * unless it contains *in substance* the following provisions: (Italics ours)
>
> * * * * * * *
>
> "2. A provision that the policy shall be incontestable after two years from its date of issue except for non-payment of premiums and except for violation of the conditions of the policy relating to military or naval service in time of war."

In 1923 this section was amended to read as follows:

> "2. A provision that the policy shall be incontestable * * * except for violation of the conditions of the

policy relating to military or naval service in time of war and at the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted."

Respondent contended, in the court below,—

(1) that prior to the amendment of 1923, a life insurance policy, which contained disability and double indemnity benefits, was required by statute to contain an incontestable clause, which made the entire policy incontestable after the expiration of the contestable period, whether claim was made under the life, double indemnity, or disability benefits;

(2) that accident and health companies, in New York, had an advantage over life insurance companies, in that they were not required to have, in policies issued by them and containing benefits similar to the double indemnity and disability features of a life policy, an incontestable clause;

(3) that it was to remove such disadvantage that the New York Legislature amended the insurance laws in 1923 to permit life companies, at their option, to except from the operation of the incontestable clause, the disability and double indemnity insurance contained in life policies;

(4) that this legislative history should be considered in the interpretation of the incontestable clause in the policy involved in this suit.

We do not understand respondent by this contention to urge that the policy is governed by the law of the State of New York.

Indeed, we do not see how respondent could successfully contend that the policy was governed by New York law.

The Bill of Complaint avers (R. 3) that insured is a resident of Pennsylvania, (R. 6) that insured made application for the policy at Norristown, Pennsylvania, and (R. 7) that the policy was duly delivered to insured. The application (R. 108-109), attached to and made part of the policy, (Exhibit F of the Amended Bill of Complaint), recites that insured is a resident of, and that his place of business is at, Norristown, Pennsylvania. While it is true the bill does not aver specifically that the policy was delivered to insured in Pennsylvania, we submit that from these facts the only inference to be drawn, particularly since there is no averment to the contrary, is that the policy was delivered in Pennsylvania. The application, which by express provision of the policy (R. 136) is made part of the contract, provides (R. 108) *inter alia:*

> "The proposed policy shall not take effect unless and until delivered to and received by the Insured, the Beneficiary or by the person who herein agrees to pay the premiums, during the Insured's continuance in good health and unless and until the first premium shall have been paid during the Insured's continuance in good health; * * *"

The bill, not averring delivery of the policy and payment of the first premium at any place other than the place of the application, it is a reasonable inference that the policy was delivered to insured and the first premium paid at Norristown, Pennsylvania.

The contract of insurance is to be interpreted in accordance with the law of the state where delivery was made.

Mutual Life Ins. Co. of N. Y. v. *Johnson,* 293 U. S. 335;
Northwestern Mutual Life Ins. Co. v. *McCue,* 223 U. S. 234;
Equitable Life Assur. Society v. *Clements,* 140 U. S. 226.

The Supreme Court of Pennsylvania has never passed on the question involved in the case at bar. Accordingly, this

Court must make a choice between the alternative constructions adopted by the Circuit Court of Appeals of the Third Circuit and that of the Circuit Court of Appeals of the Fourth and Ninth Circuits in the *Ness* and *Markowitz* cases. The question is an open one before this Court and the statutes or decisions of the State of New York are not controlling since delivery of the policy was not made there.

Mutual Life Ins. Co. of New York v. *Johnson*, 293 U. S. 335.

As we have stated, we do not understand respondent's contention to be, that the policy in the case at bar is to be governed by the law of the State of New York. We understand respondent's contention to be limited to the position that, in the interpretation of the language used in the incontestable clause, the court should consider, as an aid in its interpretation, the legislative history which, respondent contends, prompted the amendment of the New York Insurance laws.

Our position is, that, where there is no question raised as to whether the policy contained provisions contrary to the law of the state where it was issued or delivered, but, where the question is, what reasonable interpretation can be placed, by the policyholder, on phraseology used in the policy, legislative history cannot be considered in such interpretation. This is particularly true where the legislative history, urged as an aid in the interpretation of the phraseology of the policy, is that of a state other than the state in which the policy was delivered.

We submit that neither this provision of the New York Insurance Law, nor the reason for its enactment, should control the interpretation of the incontestable clause for the following reasons:

1. A most compelling reason, for not regarding the statute as controlling, in the interpretation of the incontestable

clause in Policy No. 3, is that, the language of the policy is not the language of the statute but a very much more involved language. The statute provides an optional exception in the following language:

> "At the option of the company provisions relative to benefits in the event of total and permanent disability and provisions which grant additional insurance specifically against death by accident may also be excepted."

The policy exception is in the following language:

> "except for the *restrictions* and *provisions applying to* the Double Indemnity and Disability benefits *as provided in Sections 1 and 3 respectively.*" (Italics ours.)

As is pointed out in the *Ness* and *Kaufman* cases, the company could certainly, with its skilled policy draftsmen, had they intended to except the disability and double indemnity insurance as such, have selected language which clearly said so. On the contrary, they use language pointing to the *restrictions and provisions applying* to the disability benefits as provided in Section 3. The clear inference from this is that the *restrictions* and *provisions*, which are set forth in Sec. 3, are what are excepted from the operation of the clause.

2. The statute provides *an optional exception*, when respondent chose the particular language "except for the *restrictions* and *provisions applying to* the Double Indemnity and Disability benefits *as provided in Sections 1 and 3 respectively*" (Italics ours), we submit, it is a reasonable construction of this language, to say that this particular respondent did not desire the full benefit of the optional exception to the extent of exempting the double indemnity and disability insurance as such. Respondent may have desired to take advantage of the option, only to the extent of protecting itself against the conflicting decisions on

whether the incontestable clause applied to the particular restrictions and provisions of Sections 1 and 3.

3. To have such statute and legislative history control is to require the policyholder, in this case a resident of Pennsylvania, to be familiar with the legislative policy of a foreign state. Unless the language is so clear as to enable the policyholder to recognize the exception made, he should not be charged with an interpretation based on legislative history. The true test, for interpreting the clause, is the interpretation, which the policyholder may reasonably get from the language of the policy.

4. While legislative history is a proper consideration where interpretation of the statute itself is involved, where interpretation of the contract made between two parties is involved the interpretation should be based on the language of the contract. This is particularly true since the statute says "unless it contains *in substance* the following provisions."

5. There is nothing, before this Court, to show that the legislative intent was to remove competition between accident and health companies. This is pointed out by the Circuit Court of Appeals in *New York Life Ins. Co.* v. *Kaufman*, 78 F. (2d) 398 (C. C. A. 9), where the court said (at page 402):

> "Counsel strongly urged, in explanation of such drafting, that the court take judicial notice of a business rivalry between groups of life and accident companies in New York, in the process of which the incontestability clause was redrafted to its present form in aid of its warring solicitors. While the court has judicial knowledge of the New York statutes, it can know nothing, outside the record, of the company's business history as causing such draftsmanship even if it were relevant to its interpretation. Much less can such knowledge be imputed to the ordinary man solicited to take the insurance."

6. So far as we have been able to find, no New York court has considered a policy, in which, the language of the incontestable clause in the case at bar was involved. Nor have we been able to find that any New York court, in its decision, considered the grounds urged by the Circuit Courts of Appeals in the *Ness* and *Markowitz* cases.

7. To petitioners, it seems that the conclusion is irresistible that if the language, used by respondent, is so uncertain as to require resort to legislative history to interpret it, an ambiguity arises, which, in accordance with the principles hereinafter set forth, must be resolved in favor of the insured.

We submit, that petitioners contention, that the effect of the exception from the incontestable clause is to preclude only such contests which pertain to the provisions and restrictions of Sections 1 and 3 of the policy, places a reasonable construction on the incontestable clause and one which a reasonable policy holder not only could, but would, make.

We submit, that respondent's contention, that limiting the application of the incontestable clause to the specific provisions and restrictions of Sections 1 and 3 makes the language a nullity, since respondent always had the right to contest them because they relate to matters of coverage or risk, places an unreasonable construction on the language used. If, as respondent contends, the only purpose of the exception was to preserve to insurer the right to contest the validity of the policy, respondent, with its staff of skilled policy draftsmen, would most certainly have used language which specifically referred to fraud in the inception or contests of validity of the policy. At least it would not have chosen language which called attention to the *provisions and restrictions applying to* disability and double indemnity benefits as provided in Sections 1 and 3.

Certainly the least that can be said is that the language used in creating the exception is not clear, is ambiguous, permits different constructions, and, in accord with the general principle of insurance law, must be construed most strongly in favor of the insured.

E.

The insurer having used, in the creation of the exception from the incontestable clause, language which is uncertain, ambiguous, and requires interpretation because susceptible to two or more different, but sensible or reasonable constructions, that construction which is most favorable to the insured must be adopted.

In *Couch "Cyclopedia of Insurance Law,"* Vol. I, page 390, Sec. 187, it is said (citing many authorities in support thereof):

> "Like provisions for forfeiture, provisos, exceptions or exemptions, and words of limitation in the nature of an exception are strictly construed against their proposers, the insurer, especially if of uncertain import or reasonably susceptible to a double construction."

In *Aschenbrenner* v. *U. S. F. & G. Co.*, 292 U. S. 80, this Court, speaking through Mr. Justice Stone, said at page 84:

> "The phraseology of contracts of insurance is that chosen by the insurer and the contract in fixed form is tendered to the prospective policy holder who is often without technical training, and who rarely accepts it with a lawyer at his elbow. So if its language is reasonably open to two constructions, that more favorable to the insured will be adopted, Stipcich *v.* Metropolitan Life Ins. Co., 277 U. S. 311, 322; Mutual Life Ins. Co. *v.* Hurni Packing Co., 263 U. S. 167, 174; and unless it is obvious that the words are intended to be used in their technical connotation they will be given the meaning that common speech imports." (Citing authorities.)

The reasons for this rule of construction are set forth in *Couch Cyclopedia of Insurance Law,* Vol. 1, page 402. Among the reasons assigned are:

1. Policies of insurance are made on printed forms carefully prepared in the light of wide experience by experts employed by the insurer and in the preparation of which the insured has no voice.

2. Insurance policies are drawn by the insurer so as to limit and define their scope; hence, it is only fair that, any language employed in such limitation or definition should be resolved most strongly against the insurer whose language it is and who is aided by skilled experts in selecting its language.

There can be no contention that this rule should not apply in the case at bar because the language used was placed in the contract pursuant to statute. As we have seen (page 40 of this brief), the language of the statute is far different from that of the exception in the policy. Even if it were not, we submit, the true test is, what reasonable interpretation a policy holder may place on the same when reading it.

F.

The interpretation of the incontestable clause urged by petitioners does not condone fraud, nor work a great injustice to life insurance companies.

In the court below, respondent argued:

> "We believe that a grave injustice will be done to life insurance companies and to the policyholders for whom such companies act as trustees were the erroneous and artificial reasoning initiated by the Court in the *Ness* case to be followed by this and other Courts. * * * No reason can be seen why the rule of these cases (cases cited by respondent), and the sound reasoning underlying it should be departed from to support the

> fraudulent claims of a small group of policyholders against the meritorious position of the great number of honest policyholders constituting these mutual companies."

We submit that as set forth in *Mayer* v. *Prudential Ins. Co. of America,* 184 A. 267, 121 Pa. Super. 475 (from which we have quoted at length, pages eight, nine, ten and eleven, this brief), Pennsylvania has, in both its case and statute law, recognized the incontestable clause as a proper provision and one supported by the public policy of the state.

This Court has said in *Northwestern Life Ins. Co.* v. *Johnson,* 254 U. S. 96, at 101:

> "The object of the clause is plain and laudable,—to create an absolute assurance of the benefit as free from any dispute of fact except the fact of death, as soon as it reasonably can be done."

In *Feierman* v. *Eureka Life Insurance Co.,* 279 Pa. 507, the Supreme Court of Pennsylvania, in speaking of the incontestable clause, said at page 509:

> "Its purpose is not to preclude inquiry into the truthfulness or good faith of the statements made in the application, but to fix a time within which such inquiry shall be made. This is unquestionably a matter concerning which the parties may contract, and such contracts have been upheld as reasonable and proper, and not against public policy. The principle involved is thus expressed in Wright *v.* Mutual Benefit Life Association of America, 118 N. Y. 237, 6 L. R. A. 731: 'No doubt the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against paying ill-afforded premiums for a series of years; and, in the end, and after the payment of premiums, the death of the insured, and the loss of his and the testimony of others, the claimant, instead of receiving the promised insurance, is met by an expensive law suit to determine that the insurance which the deceased has been paying for through many

> years has not, and never had, an existence except in name. *While fraud is obnoxious, and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specific time establishing the invalidity of the contract of insurance, it should thereafter be treated as valid.'* (Italics ours.) In Murray *v.* State Mutual Life Insurance Co., 22 R. I. 524, 53 L. R. A. 742, it was said that the insertion of such a provision in the policy is virtually saying to the insured, 'We will take two years in which to ascertain whether your representations are false or not, and whether you have been guilty of any fraud in obtaining the policy; and if, within that period, we cannot detect any such falsity or fraud, we will obligate ourselves to make no further inquiry, and make no defense on account of them.' '' See also Lawler *v.* Home Life Insurance Co., 59 Pa. Superior Ct. 409. (Italics ours.)

We should like to point out that, in the application, insured was asked what other life insurance he then had in force, to which he answered (R. 109-110):

> Northwestern, $80,000.; No Disability Benefits.
> Mutual Life, $10,000.;
> Union Central, $50,000.; Disability Benefits on $10,000.
> Provident Mut., $25,000.; Disability Benefits on $25,000.

Accordingly, the insured had in force $165,000. in life insurance and $35,000. in Disability Insurance when he applied for the policy issued by respondent in the sum of $40,000.

When insured has a large amount of life insurance the company makes a thorough investigation before issuing more insurance, particularly a $40,000. policy. During the year, that respondent reserved by its incontestable clause, to investigate fraud in the procurement of the policy, if

one-half of the fraud charged is true, the company certainly would have found something to put it on inquiry before the expiration of the incontestable clause.

It is only when a claim is made under the disability features that the company bestirs itself and grows articulate as to the provisions of the policy.

In this connection, we would like to point out that in its bill the company does not seek to cancel the double indemnity benefits. If respondent is correct in its construction of the incontestable clause, the alleged fraud, in procurement of the policy, goes to the double indemnity features of the policy as well as to the disability features. The respondent, by not seeking to cancel the double indemnity features, invites insured to keep on paying premiums for the double indemnity benefits. The insured, in the construction of this clause, has a right to ask, "Am I going to pay premiums on this double indemnity benefit only to have, after my death, the beneficiary faced with another contest, when the evidence depends on witnesses who may have died or whose memory may have grown dim?"

We submit, that, it is no injustice to the other policyholders to have the construction adopted, which petitioners urge. All such construction does is to say that insured has entered into a contract, which gave the insurer a year to investigate whether there was any fraud in the procurement of the same, and if insurer did not choose to make such investigation, it cannot thereafter complain of anything such investigation would have revealed.

Not only does such construction not work an injustice to the other policyholders, but it saves them from having purchased only a law suit, when they purchased a policy with similar language. We submit there are large numbers of policyholders who may have made incomplete statements without any wilful or deliberate fraud. If the in-

surer sits idly by, making no investigation during the contestable period, and accepts premiums until a claim is presented, not only has insured failed to get the security which he sought, but he has been deprived of an opportunity, to purchase a policy of insurance, which does clearly provide what his rights shall be. Misfortune having descended on him in the form of disability, he is then unable to purchase the protection he could have sought for, if the language of respondent's policy had clearly put him on notice, that it excepted, from the incontestability clause, all claims for disability and double indemnity insurance.

Authorities Relied on by Respondent.

At pages 18 and 19 of this brief, we cited the authorities on which respondent relied in the lower court to support its position. As the language used, in the incontestable clause, in every one of the cases cited, except the case of *Mutual Life Insurance Company* v. *McConnell,* 20 Pa. Dist. & Co. Reports, 250 (Common Pleas Court of Mercer County), is different from that in the case at bar, they are, for the most part, not in point.

The *McConnell* case (*supra*) was decided prior to the *Ness, Markowitz* and *Kauffman* cases. It does not appear, from the opinion, that the considerations on which the *Ness, etc.,* cases rest, were presented to, or considered by, the Mercer County Court. The only other Pennsylvania decision is, that of the Court of Common Pleas in Luzerne County, in the case of *New York Life Insurance Co.* v. *Thomas,* 27 Pa. Dist. & Co. Reports, and this case adopted the holding of the *Ness* case and declined to follow the *McConnell* case.

Since the decision in the *Ness* case, with the exception of the case at bar, no court, where the language of the *Ness* case has been involved, has declined to follow it.

The only cases which our search disclosed, which were decided since the *Ness* case and declined to follow it, were cases where the exception from the incontestable clause was differently worded. They are:

Pyramid Life Ins. Co. v. *Selkirk*, 80 F. (2d) 553 (C. C. A. 5);

Smith v. *Equitable Life Assur. Soc.*, 89 S. W. (2d) 165;

Gatti v. *New York Life Ins. Co.* and *Ruhlin* v. *New York Life Ins. Co.*, both decided by the lower court on the same day as the Stroehmann case and referred to and relied on therein. (Not yet reported—petition for rehearing is pending—the relevant portions are printed as appendix to the petition for certiorari in this case.)

At page 33 of this brief, we have shown, by a quotation from the *Selkirk* case, that even the *Selkirk* case recognized that the language of the incontestable clause in the *Ness* case was very limited. Even if the *Selkirk* case was authority for the *Gatti* and *Ruhlin* cases (where the language of the incontestable clause was different), we submit the court below should not have followed it in the case at bar.

In *Smith* v. *Equitable*, 89 S. W. (2d) 165, the Supreme Court of Tennessee said (at page 168):

> "The language construed in that case" (the *Ness* case) "was not identical with that now under consideration and lent itself more readily to the construction given it, and that case can be distinguished on this ground; and we are inclined to the view that in that case the learned writer of the opinion overlooked the distinction hereinbefore referred to as emphasized by Chief Justice Cardozo between a denial of coverage and a defense of invalidity."

As we have seen (page 32 of this brief), the *Ness* case did not overlook the distinction between coverage and valid-

ity. On the other hand, the court, in the *Ness* case, pointed out specifically, that in the cases of *Scales* v. *Jefferson Standard Life Ins. Co.*, 155 Tenn. 412, 295 S. W. 58, 55 A. L. R. 537 and *Wright* v. *Phila. Life Ins. Co.* (D. C.), 25 F. (2d) 514, this distinction was recognized. The court further pointed out that not all jurisdictions recognized this distinction and that it evidently was to guard against the failure to recognize this distinction that respondent used the language it did. This clearly distinguishes the *Smith* case.

In the *Gatti* and *Ruhlin* cases (appendix to petition for certiorari), the court below relied on the *Smith* case, which, while it may be authority for the language in the incontestable clause in the *Ruhlin* and *Gatti* cases has, as we have pointed out above, no application to the language of the *Ness* case.

The other cases urged by the respondent in the court below may, generally speaking, be divided into two classes:

1. The decision is based on a supplemental and independent agreement governing disability and double indemnity benefits. The cases are:

Penn Mutual Life Ins. Co. v. *Hartle*, 166 Atl. 614 (Md.), 165 Md. 120, 91 A. L. R. 1466;

Penn Mutual Life Ins. Co. v. *Joseph*, 5 F. Supp. 1003;

Guardian Life Ins. Co. v. *Katz*, 275 N. Y. Supp. 743;

Scott v. *New England Mutual*, 256 N. W. 910 (decision was also based on a statute).

2. There is little, if any, discussion of the incontestable clause, or the exceptions thereto, but simply a statement of the conclusions of the court.

New York Life v. *Davis*, 5 Fed. Supp. 316 (D. C. W. D. Pa.);

Kaffanges v. *New York Life Ins. Co.*, 59 F. (2d) 475 (incontestable clause not quoted in opinion);

Chambers v. *New York Life*, 148 N. Y. Misc. 561 (Incontestable clause not quoted in opinion);

Conn. Mutual v. *Hirsch*, 266 N. Y. Supp. 950 (no opinion);

Mutual Life v. *McConnell*, 20 Pa. D. & C. R. 250;

New York Life v. *Gresham*, 154 So. 547;

Conn. General Life Ins. Co. v. *Brandstein*, 233 N. Y. App. Div. 723 (no opinion filed);

Steinberg v. *New York Life Ins. Co.*, 263 N. Y. 45;

Greber v. *Equitable Life*, 28 P. (2d) 817 (interpretation of a statute was involved);

Paulson v. *Montana Life Ins. Co.* (Wash.) 43 P. (2d) 971 (the language of the clause involved does not appear in the opinion, nor does the opinion state that the company's interpretation of the clause was challenged by the insured).

We submit, therefore, that respondent has cited no authorities on the basis of which the *Ness* case should not be followed, nor has respondent cited any authority which appropriately answers the contentions made in this brief.

Conclusions.

We, respectfully, submit:

(1) That the plain and unambiguous language of the exception from the incontestable clause, in the case at bar, limited the insurer to defenses applicable to the particular provisions and restrictions set forth in Sections 1 and 3 of the policy;

(2) That fraudulent statements in the application, not being referred to in Sections 1 or 3 of the policy, were not excepted by the language of the incontestable clause;

(3) That even if the phraseology, of the exception from the incontestable clause, is not clearly limited to the provi-

sions and restrictions contained in Sections 1 and 3 of the policy, the language used by the insurer is ambiguous and susceptible of two reasonable but different constructions;

(4) That under familiar principles relating to construction of ambiguous clauses, particularly those clauses which create exceptions, the construction which is most favorable to the insured must be adopted;

(5) That this construction is, that the defense of fraudulent statements in the application was not excepted from the operation of the incontestable clause;

(6) That these conclusions are supported by both reason and authority.

WHEREFORE, we respectfully submit that this Court should decide that the contestable period, specified in the policy, having expired and the insurer not having excepted, from the operation of this clause, the defense of fraudulent statements in the application, the respondent is thereby precluded from raising such defense and that as to Policy No. 4,361,192, the Amended Bill in Equity does not set forth a cause of action.

GEORGE H. HAFER,
GEO. ROSS HULL,
CARL B. SHELLEY,
Counsel for the Petitioners.